RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

ISAAC STONE *v.* GEORGE H. SARGENT.

While the jurisdiction of the federal court over a case in which the conditions of the Acts of Congress relative to the removal of causes, have been complied with, cannot be defeated by any action or omission of the state court, yet it is the duty of the state court before relinquishing its jurisdiction to be satisfied that those conditions have been complied with.

The decision of an inferior state court upon the question of its own jurisdiction is subject to review by the highest court of the state, and this in turn by the Supreme Court of the United States; but the decision of the state courts is not subordinate to the opinion of any other federal tribunal.

The Act of March 3d 1875, providing that either party may file a petition for removal without any affidavit, "before or at the term at which the cause could be first tried, and before the trial thereof," does not take away the right of a citizen of another state, under sect. 639 of the Revised Statutes, to remove a cause at any time before trial, on making an affidavit of his belief and reason to believe that from prejudice or local influence he will not be able to obtain justice in the state court.

A hearing before an auditor who determines nothing finally and whose report is only *prima facie* evidence upon a trial before the court or jury, is not a trial within the meaning of the Acts of Congress.

EXCEPTIONS to an order of the Superior Court removing the record and proceedings to the Circuit Court of the United States.

D. W. Bond, for plaintiff

C. Delano, for defendant

The opinion of the court was delivered by

GRAY, C. J.—Among the provisions of former Acts of Congress, concerning the removal of causes from the state courts to the federal courts, which are substantially re-enacted in the Revised Statutes of the United States, are those of the Act of March 2d 1867, by which any suit commenced in any court of a state between a citizen of that state and a citizen of another state, in which the amount in dispute, exclusive of costs, exceeds the sum or value of $500, may be removed for trial into the Circuit Court of the United States next to be holden for the district in which the suit is pending, upon the petition of the citizen of the other state, whether he be plaintiff or defendant, filed "at any time before the trial or final hearing of the suit," and supported by his affidavit that he has reason to believe and does believe that from

prejudice or local influence he will not be able to obtain justice in the state court, and upon his offering good and sufficient surety for his entering in the Circuit Court, on the first day of its session, copies of the process against him, and of all pleadings and proceedings in the cause, and for his appearance there. The act provides that "it shall thereupon be the duty of the state court to accept the surety and to proceed no further in the cause against the petitioner;" and that, "when the said copies are entered as aforesaid in the Circuit Court, the cause shall there proceed in the same manner as if it had been brought there by original process," and the copies of pleadings shall have the same force and effect as the originals: U. S. Rev. Sts., sect. 639, cl. 3.

As appears by the authorities cited by the learned counsel for the defendant, if the case is within the Act of Congress, and the proper petition, affidavit and surety are filed in the state court, the Circuit Court of the United States takes jurisdiction of the cause, although the state court omits or even refuses to make any order for its removal. In other words, the jurisdiction of the federal court over a case in which the conditions of the Act of Congress have been complied with cannot be defeated by any action or omission of the state court.

On the other hand, it is the duty of the state court, before relinquishing jurisdiction of a cause once lawfully brought before it, and discharging that cause from its own docket, to be satisfied that there has been a compliance with those conditions. If the highest court of the state errs in holding that the petitioner is not entitled to remove the cause, its judgment may be revised and reversed on writ of error by the Supreme Court of the United States, and all proceedings had in the courts of the state after due application for a removal, may be ordered by that court to be set aside. But no Act of Congress, and no adjudication of the Supreme Court of the United States, has made the opinion of the state court, upon the question whether its own jurisdiction must be surrendered, subordinate to the opinion of any federal tribunal below the Supreme Court.

It is, to say the least, a matter of grave doubt whether the Circuit Court of the United States, in such a case as this, could issue a writ of mandamus or of certiorari to the state court; and, if it could, it would only be when no copy of the record had been filed in the Circuit Court, and to obtain such a copy for the pur-

pose of guiding its own proceedings, and not to restrain or control the judicial action of the state court: *Ex parte Turner*, 3 Wall., Jr. 258; *Murray* v. *Patrie*, 5 Blatchf. C. C. 243; s. c. cited 6 Id. 382–386; s. c. *nom. Justices* v. *Murray*, 9 Wall. 274, 276 note; *Hough* v. *Western Transportation Co.*, 1 Biss. 425; *In re Cromie*, 2 Id. 160; *Osgood* v. *Chicago, Danville & Vincennes Railroad*, 6 Id. 330; *Scott* v. *Clinton & Springfield Railroad*, 6 Id. 529; *United States* v. *McKee*, 4 Dill. 1.

In Dillon on Removal of Causes (2d ed.) 77–79, it is said that the Circuit Court of the United States has the power to protect its suitors by injunction against a judgment rendered in the state court after a proper application to remove the cause. But the only authority there cited is *French* v. *Hay*, 22 Wall. 250, in which the circumstances were very peculiar, and the judgment in no way supports the position of the learned author. In that case, the principal cause had been removed without objection from a state court of Virginia into the Circuit Court of the United States, and the state court of Virginia had not undertaken to retain jurisdiction thereof. The injunction issued by the federal court was not against proceeding with the original suit in the state court of Virginia, but against prosecuting a new suit, commenced in the courts of another state after the right of removal had been perfected, upon a decree rendered in the state court of Virginia before the application for removal. The judgment is limited by its language, as well as by the facts before the court, to injunctions to stay suits commenced after the jurisdiction of the federal court has attached, and in any other view would be inconsistent not only with the clear terms of the Acts of Congress, but with earlier and later decisions of the Supreme Court of the United States. U. S. St., March 2d 1793, sect. 5; U. S. Rev. Sts., sect. 720; *Diggs* v. *Wolcott*, 4 Cranch 179; *Watson* v. *Jones*, 13 Wall. 679, 719; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 Id. 340. See also BRADLEY, J., in *Live Stock Association* v. *Crescent City Co.*, 1 Abbott U. S. 388, 404–407; s. c. 1 Woods 21, 34–36.

The inconvenience of the construction for which the defendant contends may be made more apparent by applying it to a case in which the amount in dispute is more than $500 and less than $5000. Such a case, in the event of a decision in the highest court of the state against a right claimed under the Act of Con-

gress, could be taken by writ of error to the Supreme Court of the United States: U. S. Rev. Sts., sect. 709. But the decision of the Circuit Court of the United States could not be re-examined in the Supreme Court: U. S. Rev. Sts., sect. 691; U. S. St., February 16th 1875, sect. 3. So that the effect would be to make the decision of the Circuit Court of the United States paramount to the deliberate judgment of the highest court of the state.

This court has uniformly held that any court of the Commonwealth, before declining the further exercise of jurisdiction over a cause, must consider and determine whether, upon the record and papers before it, the petitioner has brought himself within the Acts of Congress; and that the ruling of a judge of this court or of the Superior Court upon that question may be revised in the full bench of this court upon bill of exceptions or report of the judge: *Commonwealth* v. *Casey*, 12 Allen 214; *Morton* v. *Mutual Ins. Co.*, 105 Mass. 141; *Bryant* v. *Rich*, 106 Id. 180; *Florence Sewing Sewing Machine Co.* v. *Grover & Baker Co.*, 110 Id. 70; *Mahone* v. *Manchester & Lawrence Railroad*, 111 Id. 72; *Galpin* v. *Critchlow*, 112 Id. 339; *Du Vivier* v. *Hopkins*, 116 Id. 125; *New York Warehouse Co.* v. *Loomis*, 122 Id. 431. And, notwithstanding some dicta of the learned justice who delivered the opinion in *Insurance Co.* v. *Dunn*, 19 Wall. 214, 223, having an opposite tendency, the practice of this court in this regard is upheld by many decisions of the Supreme Court of the United States, of which it will be sufficient to cite a few of the more recent.

In *Florence Sewing Machine Co.* v. *Grover & Baker Co.*, 110 Mass. 70, a defendant filed a petition for a removal of the case into the Circuit Court of the United States under the Act of Congress of 1867, which was refused by a justice of this court, upon the ground that the case was not within the act; and upon exceptions to such refusal, and to his rulings at the subsequent trial, his decision was affirmed by the full court. The case was, nevertheless, entered in the Circuit Court of the United States, and a motion of the plaintiff to remand it was overruled by that court: 1 Holmes C. C. 235. But the Supreme Court of the United States, on a writ of error to this court, affirmed its judgment, without a suggestion that there was any irregularity in its proceedings, or that it had lost its jurisdiction of the case by the entry thereof in the Circuit Court: 18 Wall. 553.

So in *Bryant* v. *Rich*, 106 Mass. 180, a justice of the Superior Court declined to grant a petition for removal under the same Act of Congress, on the ground that it was filed too late; and exceptions were taken to his decision and were overruled by this court. The Supreme Court of the United States, upon writ of error, held, in the words of Chief Justice WAITE, that "the transfer was properly refused," and affirmed the judgment: *Vannevar* v. *Bryant*, 21 Wall. 41. A similar decision was made upon a writ of error to the Supreme Court of Iowa in *Railroad Co.* v. *McKinley*, 99 U. S. 147.

In *Fashnacht* v. *Frank*, 23 Wall. 416, an alien, whose property had been ordered, by a decree of a District Court of the state of Louisiana, to be sold at the suit of a citizen of that state holding a mortgage thereon, obtained from the same court a temporary injunction, which, upon hearing, was dissolved; and afterwards filed a petition, under the Act of Congress of July 27th 1866, for the removal of the case into the Circuit Court of the United States, which was refused, and he then appealed from the decree dissolving the injunction to the Supreme Court of Louisiana, which affirmed that decree. The Chief Justice of the United States, in delivering the judgment of the Supreme Court dismissing for want of jurisdiction a writ of error to the state court, said that the petition for removal "was at once very properly overruled, for the reason that a final judgment had already been rendered," and that the appeal to the Supreme Court of the state "was clearly the appropriate remedy for the correction of the errors of the District Court, if there were any."

In another case, a defendant's petition for removal under the Judiciary Act of 1789, which alleged the citizenship of the plaintiff at the date of the petition, but not at the time of the commencement of the action, was for that reason refused by the Supreme Court of the state of New York, and its judgment affirmed in the Court of Appeals: *Pechner* v. *Phœnix Ins Co.*, 6 Lansing 411, and 65 N. Y. 195. The case was taken by writ of error to the Supreme Court of the United States; and it was there argued that the compliance with the conditions of the Act of Congress ousted the Supreme Court of New York of its jurisdiction, and all further proceedings therein were void. But the judgment was affirmed; the chief justice saying, "This right of removal is statutory. Before a party can avail himself of it, he

must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended." "The court had the right to take the case as made by the party himself, and not inquire further. If that was not sufficient to oust the jurisdiction, there was no reason why the court might not proceed with the cause:" 95 U. S. 183. A like decision was made where petitions under the Act of 1867 contained defective allegations of the citizenship of the adverse party; and the chief justice said, "Holding, as we do, that a state court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed, which, upon its face, shows the right of the petitioner to the transfer, it was not error for the court to retain these causes:" *Amory* v. *Amory*, 95 U. S. 186.

In the very recent case of *Meyer* v. *Construction Co.*, 100 U. S. 457, a defendant in an inferior court of the state of Iowa filed a petition under the Act of Congress of March 3d 1875, for a removal of the cause into the Circuit Court of the United States. The state court refused the petition, because one of the two sureties on the bond offered was an attorney of the court, who was forbidden by the law and practice of Iowa to be a surety; and because the petition was filed too late, after the trial had begun. The defendant, notwithstanding, obtained from the clerk a copy of the record, and filed it in the Circuit Court of the United States, and that court overruled a motion of the plaintiff to remand the cause. The state court, against the protest of the defendant, proceeded with the cause, and entered a final decree for the plaintiff, and the defendant appealed therefrom to the Supreme Court of the state, which affirmed that decree. The cause also proceeded in the Circuit Court of the United States, and there resulted in a decree for the defendant. The matter was brought before the Supreme Court of the United States by writ of error to the state court, and by appeal from the decree of the federal court. The Supreme Court of the United States held that the cause was legally removed, because one of the sureties was admitted to be sufficient and the

Act of Congress did not require more than one, and because upon the facts appearing on the record the trial had not begun when the petition for removal was filed; and that the defendant had not, by taking part under protest in the subsequent proceedings in the state court, waived his right to insist that the cause had been so removed. The Supreme Court, on the writ of error, reversed the judgment of the Supreme Court of Iowa, and remanded the cause to that court with instructions to reverse the decision of the inferior court of the state, and to direct that court to proceed no further with the suit; and, on the appeal, reversed the decree of the Circuit Court of the United States upon the merits, and remanded the cause for further proceedings in that court. But no suggestion was made that the state court had no authority, for the purpose of ascertaining whether it should retain jurisdiction of the cause, to consider whether the provisions of the Act of Congress had been complied with. On the contrary, the chief justice, in delivering judgment, clearly implied that if the sufficiency of the surety, or the citizenship of either party, had been denied in point of fact, the state court might have inquired into it, and added, "We fully recognise the principle, heretofore asserted in many cases, that the state court is not required to let go its jurisdiction until a case is made, which, upon its face, shows that the petitioner can remove the cause as a matter of right."

The bill of exceptions allowed by the chief justice of the Superior Court to his order granting the petition for a removal of the cause into the Circuit Court of the United States is therefore rightly before us, and the motion to dismiss it for want of jurisdiction must be denied. But, upon consideration of the exceptions, we are of opinion that they cannot be sustained.

The petition for removal was filed "before the trial" of the suit in the state court, as required by the U. S. Rev. Sts., sect. 639, cl. 3; and we concur in the opinion, which has been expressed by Mr. Justice MILLER, and, so far as we are informed, by every other federal judge who has had occasion to decide the question, that the Act of Congress of March 3d 1875, which provides that, in any suit between citizens of different states, either party may file a petition for removal, without any affidavit, "before or at the term at which said cause could be first tried and before the trial thereof," and which repeals only such acts and parts of acts as are in conflict with its provisions, has not taken away the right

of a citizen of another state to remove a suit between himself and a citizen of the state in which the suit is brought, at any time before the trial, upon making affidavit of his belief and reason to believe that from prejudice or local influence he will not be able to obtain justice in the state court: Dillon on Removal of Causes 29; *Arapahoe County* v. *Kansas Pacific Railway*, 4 Dill. 277, 287; *Cooke* v. *Ford*, 16 Am. Law Reg. (N. S.) 417; *Whitehouse* v. *Continental Insurance Co.*, 2 Fed. Rep. 498. See, also, *Bible Society* v. *Grove*, 101 U. S. 610.

The hearing before an auditor, who determines nothing finally, but whose report is, by the Gen. Sts., c. 121, sect. 46, only *prima facie* evidence upon a subsequent trial before the court or jury, is not a trial, within the meaning of the Acts of Congress; and consent to the appointment of an auditor is no waiver of the right to remove before trial under the U. S. Rev. Sts., sect. 639, cl. 3. In *Hanover Bank* v. *Smith*, 13 Blatch. C. C. 224, cited for the plaintiff, the party who was held to have waived his right of removal had consented, upon the case being called for trial in court, and in order to avoid such trial, that it should be tried by a referee named.

Exceptions overruled.

Since the publication of the note to *Taylor* v. *Rockefeller*, in 18 Am. Law Reg., N. S. 310, the law relating to Removal of Causes has been the subject of constant consideration in the federal, and to some extent, in the state courts. In this note an endeavor will be made to group the cases in their appropriate connections.

I. Perhaps the most important question arising under the Act of March 3d 1875, 18 Stat. at Large, part 3, p. 470, is the construction of the second section of the act which entitles either party to remove a cause in certain cases of diverse citizenship. By this act, the right of removal is given in any suit in which there is "a controversy between citizens of different states." The meaning of this phrase has now been settled by a majority of the Supreme Court (SWAYNE, STRONG and BRADLEY, JJ., dissenting, and HUNT, J., absent), in the *Removal Cases*, 10 Otto 457; but before that decision there was great divergence in the opinion of the judges called upon to interpret the act. The views expressed by Mr. Justice BRADLEY, in his dissenting opinion, had been those previously adopted in several of the Circuit Courts.

This view, in substance, was that by the Act of March 3d 1875, Congress had intended to confer upon the Circuit Courts all the jurisdiction which it was possible to confer under the constitution, art. 3, sect. 2, and that the act was to be construed liberally; and that, therefore, in all cases of diverse citizenship, irrespective of the question whether some of the plaintiffs were of the same citizenship with some of the defendants, the cause was one which might be removed. The arguments in support of this construction of the act are so fully stated in the opinion of Justice BRAD-

LEY, 10 Otto 479, that they are worthy of quotation: "This portion of the act gives the right of removal to either party, in any suit in which there is "a controversy between citizens of different states." In my judgment a controversy is such, as that expression is used in the constitution, and in the law, when any of the parties on one side thereof are citizens of a different state or states from that of which any of the parties on the other side are citizens. It is true, if there are other parties on opposite sides of the controversy who are citizens of a common state, it may also be a controversy between citizens of the same state. In other words, a controversy may be, at the same time, both a controversy between citizens of the same state, and between citizens of different states. But the fact that it is both, does not take away the federal jurisdiction. Neither the constitution, nor the law, declares that there shall not be such jurisdiction if any of the contestants on opposite sides of the controversy are citizens of the same state; but they do declare that there shall be such jurisdiction if the controversy is between citizens of different states. The gift of judicial power by the constitution, and the gift of jurisdiction by the law, are in affirmative terms; and those terms include as well the case when only part of the contestants opposed to each other are citizens of different states, as that in which they are all of different states. And I see no reason why both the constitution and the law should not receive a construction as broad as that of the terms which they employ. * * * It seems to me clear that in construing the present law, we not bound by the construction given to the old Judiciary Act. The words of that act conferring jurisdiction upon the Circuit Courts in respect of citizenship, were not the same as those used by the present law or by the constitution. It only conferred jurisdiction when "the suit is between a cittzen of the state where the suit is brought, and a citizen of another state." The singular number only was used; and the courts in applying the law to cases in which there was a plurality of the plaintiffs or defendants, construed it (perhaps justly), as requiring that each plaintiff and each defendant should have the citizenship required by the law. But now it is not so. The present law follows the words of the constitution, and gives jurisdiction to the Circuit Courts in the broadest terms, namely, whenever in any suit, there is "a controversy between citizens of different states," and this broad and general expression, as I think I have shown, gives jurisdiction where any of the contestants on opposite sides of the controversy are citizens of different states."

In *Girardey* v. *Moore*, 3 Woods 399, the same judge had said, "The Act of 1875, undoubtedly, greatly enlarges the class of cases which may be removed from the state to the federal courts. Before this, Congress had never invested the federal courts with jurisdiction arising from diverse citizenship, co-extensive with the judicial power conferred upon the general government. Subject to a limitation as to the amount in controversy, this was attempted to be done by that act. The true interpretation of this statute involves the true interpretation of the constitutional power. The jurisdiction given to the Circuit Court is as broad as the judicial power." Though these views have been decided to be erroneous, they may have an historical interest hereafter. An opinion of BUNN, J., in *Sheldon* v. *Keokuk Packet Co.*, 1 Fed. Rep. 789, is instructive in this connection; in speaking of the second section of the act, he says, "It seems a self-evident proposition that the first clause adopting as it does the language of the constitution, which is the only source of power in such cases, confers all the jurisdiction which it was competent for Congress to confer on the federal

courts, except, perhaps, that the right of removal under that clause attaches to the party plaintiff or defendant, so that where some are residents and some non-residents, all might have to join in the application, which is not the case under the second clause. It might be claimed that the second clause amounts to a legislative construction of the first, that it does not include a case where some of the defendants or plaintiffs are non-residents, but one or more reside in the state with the opposite party. But it is not to be presumed that Congress used the language of the constitution in a different sense from that in which the framers of that instrument used it, or that Congress, in the second clause, intended to provide for cases not covered by the constitutional provision. The effect of the second clause is to allow a removal in the class of cases therein described on the application of one or more plaintiffs or defendants without the concurrence of the others. There is perhaps another effect to be given to the second clause. It manifestly provides for the same class of cases as is provided for in the law of 1866, but instead of allowing a severance of the cause it takes the whole case to this court, and the decisions thus far are to the effect that in this respect it supersedes the law of 1866. Taking the section together, it would appear that it was the intention of Congress in all cases where there is a controversy between citizens of different states, which is joint and indivisible in its nature, to allow a removal on the application of the party plaintiff or defendant. And when there are several controversies in the same suit that are properly severable in their character, to allow a removal on the application of any one or more of the plaintiffs or defendants actually interested in any one of such controversies, and who may reside in a state other than the one in which the other party to such controversy resides."

The opinion of NIXON, J., in *Ruckman* v. *Ruckman*, 1 Fed. Rep. 587, tends in the same direction.

But the question is now settled by the *Removal Cases*, *supra*, contrary to these opinions. The opinion of WAITE, C. J., may be regarded as the guide for future cases. He says, after quoting the act, "This, we understand to mean that when the controversy about which a suit in the state court is brought, is between citizens of one or more states on one side, and citizens of other states on the other side, either party to the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If, in such arrangement, it appears that those on one side are all citizens of different states from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit: *Coal Co.* v. *Blatchford*, 11 Wall. 174. Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts, this being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists."

The difference in the construction thus given to the Act of March 3d 1875, from that given to previous acts, is, that though the controversy must still be between opposing parties of entirely different states, the court will arrange the parties upon opposing sides according to their actual relationship with the case, and not confine the inquiry into the relationship of the parties to the formal statement of the pleadings.

In *Walden* v. *Skinner*, 11 Otto 577, the principle of the *Removal Cases*, *supra*, was extended and applied to a case where there were certain nominal parties on the record who had no real interest in the controversy. The existence of a common citizenship between such nominal parties and some of their opponents, was held not to destroy the jurisdiction of the federal court.

In *Ayers* v. *Chicago*, 11 Otto 184, an order of the Circuit Court remanding a cause upon the ground that certain, though not all, of the opposing parties had a common citizenship, was affirmed.

The Circuit Court in New York seems to have anticipated the statement of the law thus announced by the Supreme Court. In *Sawyer* v. *Switzerland Marine Insurance Co.*, 14 Blatch. 451, a cause was remanded upon the ground that the requisite jurisdictional citizenship must exist as to each of the opposing parties, and in *Van Brunt* v. *Corbin*, 14 Blatch. 496, the same doctrine was reiterated with the qualification that where the parties were nominal, the case would be different. To the same effect is *Donohue* v. *Mariposa Land Co.*, 5 Sawyer 163.

Edgerton v. *Gilpin*, 3 Woods 277, enunciates the same doctrine as *Walden* v. *Skinner*, *supra;* and to the same effect are *Goodenough* v. *Warren*, 5 Sawyer 494; *Burke* v. *Flood*, 1 Fed. Rep. 541, and *Ruble* v. *Hyde*, 3 Id. 330.

In *Bailey* v. *New York Savings Bank*, 2 Fed. Rep. 14, it was held, that where a stakeholder is sued by a citizen of his own state, and the fund is claimed by a citizen of a different state, who is permitted to intervene as a party defendant, the case is not properly removable to the federal court. Upon a motion to remand, BLATCHFORD, J., said, "There is not in this case, as it now stands, any controversy between citizens of different states to which a defendant, citizen of the same state as the plaintiff, is not a necessary party, so as to make a case within the first sub-division of sect. 2, of the Act of 1875, nor any controversy which is wholly between citizens of different states, and which can be determined between them without the presence of a defendant, citizen of the same state with the plaintiff, actually interested in such controversy so as to make a case within the second sub-division of sect. 2, of the Act of 1875. No case is cited where a removal has been allowed under sect. 2, under circum stances such as those which exist in the present case."

In *Cissel* v. *McDonald*, 16 Blatch. 150, a suit between a subject of Great Britain and a citizen of the District of Columbia, was remanded upon the ground long ago settled in the Supreme Court, that an inhabitant of the District of Columbia is not a citizen of any state within the meaning of the law.

In *New Hampshire* v. *Grand Trunk Railroad Co.*, 3 Fed. Rep. 887, it was held, that a prosecution against an alien criminal cannot be removed upon the ground of alienage. In *Lanz* v. *Randall*, 4 Dill. 425, the question arose, whether a statute of Minnesota, giving to aliens the right to vote, made them citizens. The court held, that the statute could have no such effect, and, therefore, a suit between such an alien, resident in Minnesota, and a citizen of Minnesota was removable to the federal court.

Where a case is properly removed, upon the ground that the plaintiff was an alien, the fact that after such removal, he became a citizen of the same state as the defendant, does not destroy the jurisdiction: *Houser* v. *Clayton*, 3 Woods 273. The same principle is recognised in *McLean* v. *St. Paul Railroad Co.*, 16 Blatch. 309; *Jackson* v. *Mutual Life Insurance Co.*, 3 Woods 413; and *Cook* v. *Whitney*, 3 Id. 715, where it was held that the citizenship at the time of removal is the determining citizenship, and hence, if the necessary citizenship exist at that time, the citizenship of the parties at the begin-

ning of the suit is immaterial. In the latter case, it was also held that garnishees are not parties to the suit for the purpose of settling questions of jurisdiction, and hence the fact that they are of the same citizenship with the plaintiffs is unimportant. In *Ruckman* v. *Palisade Land Co.*, 1 Fed. Rep. 367, the next friend of a married woman was regarded in the same light; the citizenship of the married woman is the determining citizenship, for the next friend is a purely formal party.

In *Waterbury* v. *City of Laredo*, 3 Woods 371, a decision was made which it is proper to notice, because if it is correct in principle, the jurisdiction of the federal courts will be enlarged in a direction not heretofore contemplated. The suit was upon a non-negotiable instrument, made between citizens of the same state, by an assignee, a citizen of a different state. The right of removal was sustained upon the ground, that the clause contained in the latter part of the first section of the Act of March 3d 1875, restricting the jurisdiction of the Circuit Courts in suits brought by assignees, only applied to suits originally brought in the Circuit Court, and had no reference to cases removed under the second section of the act. In other words, a plaintiff having no right of action to bring a suit in the federal court could issue his writ in the state court, obtain service upon the defendant, and immediately remove the record to the federal court for further proceedings. Perhaps this decision is of no practical importance in states like Pennsylvania, where the common-law rule is in force, that the assignee of a non-negotiable instrument must bring suit in the name of his assignor.

Before leaving this branch of the subject, it may be well to refer to *Pacific Railroad Co.* v. *Ketchum*, 11 Otto 289, where the court held that the same construction which they had given to the second sectior of the Act of March 3d 1875, relating to the removal of causes upon the ground of diverse citizenship, was applicable to the first section of the act relating to the original jurisdiction.

II. The second question to be considered, is that discussed in the principal case. Although the law upon this subject cannot be said to have been definitely settled, there are several Circuit Court decisions which seem distinctly to deny the right of the state courts, after the filing of the bond and petition, to consider any question in the case. The state courts generally have taken the contrary view. In *Ex parte Grimball*, 8 Central Law Journal 151, the Supreme Court of Alabama takes the same position as the Supreme Court of Massachusetts. Portions of the opinion are worthy of quotation. "It was contended in this cause that upon the filing of a petition for removal and offering a bond for costs, as prescribed in the statute, by a person sued in a state court, the jurisdiction of the court ceased, and it must proceed no further in such suit, and that it may not look into the records and papers to ascertain for itself whether or not the cause is of that class or nature which the statute authorizes to be transferred to the federal court. We are not unmindful of the evils that may ensue from the exercise of a clashing jurisdiction by state courts and courts of the United States over the same parties and causes. It is the duty of those tribunals to do all they properly can to prevent such consequences. But that a state court shall be paralyzed into impotency by the mere presentation of the petition and bond of a party sued therein, and be rendered incompetent to inform itself by looking into the record and papers on file, whether the suit belongs to a removable class, is, we think, an indefensible proposition. Why should a petition be presented at all if no response is to be made to it, and it may not be considered? According to the argument, it were fitter

that the petition should be in form, as well as in effect, a notice to the court that the person filing it demanded that it should no further interfere with him, but transfer the cause by which he had been brought there, to another jurisdiction. * * * * The Acts of Congress particularly define the character of the suits which may be removed and the relation thereto and toward the other parties, of the persons to whom the privilege of removal is conceded. And it is enacted that if, in any such suit, a party entitled to remove it files his petition and bond, &c., the state court shall proceed no further. It is only when those conditions exist that the court is ousted by law of its jurisdiction. By yielding it in any other case, the court would not be obeying the law, but submitting to the demand of an individual, and whether it is doing the one or the other, it cannot know without so far looking into the case as to ascertain whether it be removable or not under the law."

In *Middleton* v. *Middleton's Executors*, 7 Weekly Notes 144, a similar position was taken.

The Supreme Court of the United States have never had this question directly presented to them, and have declined to express any opinion upon it when raised in argument. In *Railroad Co.* v. *McKinley*, 9 Otto 147, the state court in Iowa proceeded to final hearing of a case after a bond and petition for removal had been filed at a time, which, in their opinion, did not entitle the petitioner to a removal. The case being taken by appeal from the Supreme Court of the state to the Supreme Court of the United States, the latter court, being of opinion that the petition for removal had not been filed in time, affirmed the judgment of the state court. From this case, though cited in the principal case in support of the views there expressed, no proper argument can be maintained in favor of the asserted right of the state court, because the appellant could reverse the decree of the Supreme Court of Iowa only by showing that some right guaranteed him under the constitution or laws of the United States had been denied to him, and as, in fact, he had no right of removal, the state court had not deprived him of any right by disregarding the filing of the petition, and disposing of the case upon its merits. The *Removal Cases*, 10 Otto 457, cannot be regarded as settling anything upon this point; the chief justice very carefully limited his opinion to the points involved in the case, of which this was not one. The opinion of Mr. Justice HARLAN, in the very recent case of *New Orleans Railroad Co.* v. *Mississippi* (U. S. S. C., Oct. Term 1880 not yet reported), may, perhaps, be cited in this connection, in which he says: "The inferior state court erred, as well in not accepting the petition and bond for the removal of the suit to the Circuit Court of the United States, as in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal." In considering the effect of these words, it must be borne in mind that they were predicated upon a case, where the petition for removal presented a case in which the petitioner was entitled to a removal; hence, nothing can be inferred as to the right of the state court to proceed in a case where the petition in fact does not present such a case. In this case also, the court re-affirmed the doctrine of *Insurance Co.* v. *Dunn*, 19 Wall. 223, and *Removal Cases*, 10 Otto 457, that a party who contests a case upon its merits in the state court after that court refused to recognise a petition for removal, is not estopped from testing his right of removal by a writ of error in the Supreme Court of the United States.

Perhaps the most consistent view of this subject is that expressed in *Ex parte Wells*, 3 Woods 128, where the Circuit Court takes the ground that, upon the

filing of the petition, the state court has the right to examine the petition and pass upon its sufficiency, but the federal court, by virtue of its superior right to try the case if subject to removal, is entitled to assert its jurisdiction by proper process directed to the state court. When this is done by the federal court, it will be the duty of the state court and its officers to yield obedience to the writs from the federal court to effect such removal. The court say: "The state court surely is not bound to shut its eyes and yield to every application that comes to it. Though removal when authorized is a matter of right and not of favor, yet the court must have the right to see whether the application to remove comes within the meaning of the law. I have no doubt, however, that the Circuit Court, by virtue of its superior right to try the cause, if subject to removal, is entitled to assert its jurisdiction by proper process directed to the state court."

The opposite view is distinctly expressed in *Cobb* v. *Globe Mutual Ins. Co.*, 3 Hughes 455, where it is said, "Section three of the Judiciary Act of 1875 makes the mere filing in the state court of the petition and bond, all that is necessary to stay the proceedings of the state court, and makes it the duty of the state court, on this filing, to suspend its proceedings. Section five, in as plain terms as the English language affords, gives to the United States circuit courts complete jurisdiction to determine whether the suit was one that could be properly removed, and to decide, after making such determination, what to do with the suit—whether to proceed in it or to remand it to the state court, or to dismiss it outright. * * * By the filing of the petition and the bond in the state court, showing that the controversy is one between citizens of different states, the jurisdiction of the state court from that moment ceases, and all that court can do in the matter afterwards is *coram non judice*, null and void. The question of the sufficiency of the bond itself, the competency of the petition, the validity of the removal and each and all questions arising upon the petition, are taken away by this law from the state court, and reserved, by section five, for the United States Circuit Court, to be passed upon in the exercise of the unembarrassed and individual jurisdiction which this act gives it under the authority of the constitution over "all controversies between citizens of different states." So also it is said in *Hunter* v. *Royal Canadian Ins. Co.*, 3 Hughes 234, "The reasons which actuated the corporation court of Norfolk in refusing the motion of the defendants to remove are not conclusive with this court. The 5th section of the Act of Congress of March 3d 1875, relating to the removal of causes, confers upon this court jurisdiction to determine whether a cause be or be not properly removed, and the 3d section of the same act forbids the state court, after petition filed, to proceed any further in the suit, whatever may be its opinion on the sufficiency of the petition, and makes all proceedings there, after petition for removal made and filed, null and void; unless indeed and until the cause shall be remanded again to that court, after it has been brought by removal here." To the same effect is *Connor* v. *Scott*, 4 Dillon 242.

Whatever may be the right of the state courts to examine the sufficiency of the bond and petition for the purpose of determining their future action in the case, whether to proceed or not, it seems clear that no order of removal by the state court is necessary or proper. In *Fulton* v. *Golden*, 12 Chicago Leg. News 9, NIXON, J., says, "It was suggested in the argument that the cause should be remanded, because it did not appear that the state court made an order of removal. There is nothing in the Act of March 3d 1875, requiring

such an order, and none is necessary." And in *Penrose* v. *Penrose*, 1 Fed. Rep. 479, upon an attempt by the party removing a cause to collect certain costs allowed by the New York fee-bill for obtaining an order of removal from the state court, the allowance was refused, BENEDICT, J., saying, "Upon the filing of the petition and bond the state court could proceed no further with the cause. An order of the state court directing the removal of the cause, if made, and an order refusing the removal would be equally without effect. The power of the state court to make any order whatever was gone, and by necessary consequence its award of costs against the plaintiff was void." To the same effect is *Commercial Bank* v. *Corbett*, 5 Sawyer 172; and in this case the court reiterated the right of the federal court, by the remedies provided in the act, to enforce the recognition of its cognisance of the removed cause, which were referred to in *Ex parte Wells*, *supra*, if the state judges undertook to dispute the right of removal.

It was decided *In re Barnesville Railway Co.*, 4 Fed. Rep. 10, that after the petition and bond are filed in the state court, the federal court can do nothing in the cause until the first day of the term upon which the removing party is bound to file the transcript of the record. This decision is directly in conflict with the decision of MCKENNAN, J., in *Arthur* v. *New England Life Ins. Co.*, 6 Weekly Notes 403. The latter case, however, seems to be more in accordance with the law.

Upon the removal of a cause, the Circuit Court takes it up just at the point where it was when the petition for removal was filed. In *Duncan* v. *Gegan*, 11 Otto 810, WAITE, C. J., says, "The transfer of the suit from the state court to the Circuit Court, did not vacate what had been done in the state court previous to the removal. The Circuit Court when a transfer is effected, takes the case in the condition it was when the state court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal, than the state court would have had if the suit had remained there. It takes the case up where the state court left it off."

If after a removal the Circuit Court remand the cause, this order is the subject of an appeal. The right of appeal in this case is expressly given in section 5, of the Act of March 3d 1875, and was recognised by the court in *Ayers* v. *Chicago*, 11 Otto 184.

III. *As to the form of petition.* In *Conner* v. *Scott*, 4 Dillon 242, and *Houser* v. *Clayton*, 3 Woods 273, it was held that the petition required no affidavit; in *Dennis* v. *Alachua*, 3 Woods 680, that the petition and affidavit accompanying it, might be made by an attorney in fact of the petitioner. In *Houser* v. *Clayton*, *supra*, it was also held, that the petition might be amended. The several points just mentioned seem to be supported by the *Removal Cases*, 10 Otto 457. The petitions, however, must disclose distinctly the facts which entitle the party to the removal. *Ex parte Anderson*, 3 Woods 124. In all cases which might be removed under the Act of 1875, the bond provided for by that act must be given, and even though a case might have been removable, under sect. 639, of the Revised Statutes, after the passage of the Act of 1875, the removing party must give a bond for costs. If he fail so to do, the cause will be remanded: *Torrey* v. *Locomotive Works*, 14 Blatch. 269. But one desiring to take advantage of defects in the form of the bond or petition, must do so without delay. In *Hervey* v. *Illinois, Midland Railway Co.*, 3 Fed. Rep. 707, a delay of eighteen months was regarded as fatal, and the defect treated as waived.

IV. *When petition must be filed in state court.* The Act of Congress provides that the petition for removal is to be filed at or before the term at which

the cause could first have been tried in the state court. This has been construed to mean the first term after an issue of fact has been made up, the first term when the case could be tried in contemplation of law, not the first term when the case might be reached upon the trial list, which in a court with a crowded calendar, might be several terms after an issue had been framed. This was distinctly stated by WAITE, C. J., in *Gurney* v. *County of Brunswick*, 1 Hughes 237, "A cause cannot be tried until in some form an issue has been made up for trial; as soon as the issue is made up, the cause is ready for trial. The parties and the court may not be ready, but the cause is. The first term, therefore, at which a case can be tried, is the first term at which there is an issue for trial. An application for removal to be made in time, must be made before or at this term." These views were cited with approval and adopted in *Hunter* v. *Royal Canadian Insurance Co.*, 3 Hughes 234. In *Whitehouse* v. *Continental Fire Insurance Co.*, 2 Fed. Rep. 498, the point was taken in argument that the true construction of the act, required the petition to be filed at or before the first term, when the case could be put at issue, but the court, BUTLER, J., rejected this contention, and held that the case could be removed at any time before the pleadings are complete, or at the first term following their completion. To the same effect are *Blackwell* v. *Braun*, 1 Fed. Rep. 351, and *Forest* v. *Forest Home*, Id. 459. In *Murray* v. *Holden*, 2 Fed. Rep. 740, MCCRARY, J., takes an opposite view and holds that the petition must be filed at or before the first term, when the case might have been tried, if the pleadings had been made up with the utmost diligence, and entirely irrespective of the question whether they actually were settled or not. He says, "One of the objects of the Act of 1875, was to prevent the abuses which had been practised under the Acts of 1866 and 1867, which allowed a removal at anytime before final hearing. It was evidently the purpose of Congress to fix an earlier and a definite time, which would not permit the litigant to experiment in the state court, until satisfied that he would fail there, and then change his forum. In all the states there is by law or rule a trial term, *i. e.*, a term at which a cause may for the first time be called for trial. In practice but few contested cases are tried at the first trial term, and it often happens that controversies arise upon questions of pleading, so that as in this case, no issues of fact are joined at that time. It is, nevertheless, the term at which, within the meaning of the law, such cases could be tried, and, therefore, is the term at or before which the petition for removal must be filed. The statute does not contemplate any delay for the purpose of settling the pleadings in the state court. These can be settled in the federal court, after removal, if necessary. If the local law makes the first term after suit brought an appearance term merely, and declares that the second term is the one at which the case may be brought to trial, then the latter is the term at or before which the petition for removal must be filed. But where the first term after service of process, is the term at which, by law, a case is triable, then that is the term to which the Act of Congress refers. In other words, the term at which a case can first be tried, is the first term at which it may by law be tried. The statute should be construed so as to require litigants who have a choice of forums to make their election promptly."

It is not likely that the doctrine of this last cited case will be generally accepted. Its reasoning seems to be based upon the system of practice in force under the codes which have been adopted in the states comprising the circuit where the decision was made.

Craigie v. *McArthur*, 4 Dill. 474, decides what seems self evident that the

case must be removed while in the court of original jurisdiction.

The provisions of the Act of 1875, relating to the removal of cases begun in state courts before its passage, were considered in *Missouri* v. *Merritt*, 1 Fed. Rep. 283, where it was held that the right of removal was lost, if the case was tried in the state court after the passage of the act, although the term in which it was tried, began before the passage. But if no trial has actually taken place, an application for removal of such case was in time if made at the first term of court after the passage of the act: *Removal Cases*, 10 Otto 457. Where a case was tried in the state court on April 14th 1875, and the jury disagreeing, was continued at that term and the term following, an application for removal, afterwards made, came too late: *Bible Society* v. *Grive*, 11 Otto 610. Where one trial has been had in the state court, the right to another must be perfected before a demand can be made for the removal of the case to the Circuit Court: *Railroad Co.* v. *McKinley*, 9 Otto 147.

V. *Effect of failure to file transcript of record in federal court.* In several cases the question has arisen as to the consequences resulting from the failure of the removing party to file a transcript of the record at the next term of the Circuit Court. It may now be regarded as settled, that the only legal effect of the failure so to file, is to work a forfeiture of the bond, but it does not destroy the jurisdiction of the court. In *Jackson* v. *Mutual Life Insurance Co.*, 3 Woods 413, it is said, "This seems entirely inconsistent with the idea, that unless the copy of the record is filed on the first day of the next succeeding term of the federal court, that court is without jurisdiction of the cause. The filing of the record on the precise day prescribed, cannot, therefore, be a matter of jurisdiction; but the failure to file is one of the damages to be recovered on the bond given for the removal, and although the Circuit Court may well remand for failure of the party seeking the removal to comply with his bond, yet if the delay has caused no prejudice, and the party wishes the case to go on in the Circuit Court, and complies with all the requisites for removal at a day subsequent, it is in the discretion of the court to grant him indulgence." To the same effect is *Kidder* v. *Featteau*, 2 Fed. Rep. 616. The doctrine of these cases is confirmed by the remarks of WAITE, C. J., in *Removal Cases*, *supra*, "While the Act of Congress requires security that the transcript shall be filed on the first day, it nowhere appears that the Circuit Court is to be deprived of its jurisdiction, if, by accident, the party is delayed until a later day in the term. If the Circuit Court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete, and the removal properly effected." A different construction seems to have been given to the act in the second circuit. In *McLean* v. *St. Paul Railroad Co.*, 16 Blatch. 309, it was held, that except in the instance specified in sect. 7, of the Act of March 3d 1875, the failure to file a copy of the record by the time appointed in the bond, will necessitate a remanding of the case. The same view of the law was taken in *Bright* v. *Milwaukee Railroad Co.*, 14 Blatch. 214.

VI. *Of the effect of the Act of* 1875 *on prior acts.* The Act of 1875 repealed all prior legislation so far as it covered any case which might be removed under the act of 1875, but in so far as prior acts contained provisions which permitted removals under circumstances not covered by the Act of 1875, these acts remained in full force: *La Mothe Manufacturing Co.* v. *National Tube Works Co.*, 15 Blatch. 432, and *Dennis* v. *Alachua*, 3 Woods 683. So, that where a party is able to make the affidavit required by the Act of 1867, that owing to local influence or prejudice he will be

unable to secure a fair trial in the state court, he is entitled to a removal as provided for in that act: *Whitehouse* v. *Continental Insurance Co.*, 2 Fed. Rep. 498. But this right is only given where the adverse party is a citizen of the state in which the suit was brought: *Bible Society* v. *Grove*, 11 Otto 610. So, also, where a party, not entitled to a removal under the Act of 1875, can bring himself within the Act of July 27th 1866, he is entitled to a removal: *Wormser* v. *Dahlman*, 16 Blatch. 319. In *Yulee* v. *Vose*, 9 Otto 539, the right of removal under this act was strikingly illustrated. A suit was brought in a New York state court by a citizen of New York, against five defendants who were citizens of New York, and a sixth defendant, a citizen of Florida. The proceedings in the court below resulted in a decree for the defendants, the case was taken to the Court of Appeals, and the decree affirmed as to the five defendants, and reversed as to the sixth, one Yulee, a citizen of Florida; the record having been sent back for further proceedings, Yulee filed a petition for a removal, and the right of removal being denied in the state court, an appeal was taken to the Supreme Court of the United States, who held, that he was entitled to the removal asked for, WAITE, C. J., saying, "The evident purpose of the Act of 1866, was to relieve a person sued with others in the courts of a state of which he was not a citizen, by one who was a citizen, from the disabilities of his co-defendants in respect to the removal of the litigation to the courts of the United States, if he could separate the controversy so far as it concerned him from the others, without prejudice to his adversary. In view of the fact, that sometimes in the progress of a cause, circumstances developed themselves which made such a transfer desirable when at first it did not appear to be so, the right of removal in this class of cases was kept open until the trial or final hearing, instead of being closed after an entry of appearance, as was the rule under the Act of 1789. We think this gives such a party the right of removal at any time before the trial, when the necessary citizenship of his co-defendants is found to exist, and the separation of his interest in the controversy can be made. There is nothing in the act to manifest a contrary intention, and this construction does no more than give the party to whom this new privilege is granted an opportunity of availing himself of any circumstances that may appear in his favor previous to the time when he is called upon finally to act."

VII. *Character of proceedings which may be removed.* The character of proceedings themselves is always open to examination for the purpose of determining whether *ratione materiæ* the courts of the United States are incompetent to take jurisdiction thereof. Under this principle, in *Barrow* v. *Hunton*, 9 Otto 80, it was held that a proceeding to nullify a judgment for mere vices in the form of proceeding could not be removed, BRADLEY, J., saying, "The question presented with regard to the jurisdiction of the Circuit Court is, whether the proceedings to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the state courts, or

would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity, to set aside a decree of fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines* v. *Fuentes*, 2 Otto 10, the case might be within the cognisance of the federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof." To the same effect is *Chapman* v. *Barger*, 4 Dillon 557, where it was held that a mere dependence upon a main suit which has been determined cannot be removed. On the other hand, whenever the proceedings have an independent character, the federal court has jurisdiction. Under this principle, in *Southworth* v. *Adams*, 4 Fed. Rep. 1, a proceeding to establish a lost will was removed to the federal court, and in *Craigie* v. *McArthur*, 4 Dillon 557, jurisdiction was accepted of a proceeding to distribute the estate of a deceased person.

VIII. *Cases arising under the Constitution and laws of the United States.* Exactly what cases are removable under this clause is by no means easy to determine. *Houser* v. *Clayton*, 3 Woods 273, was an action of trespass, in which the defendant justified the alleged trespass upon the ground that he was acting under the authority of a federal court, and in pursuance of the laws of the United States. It was held that the case was removable, BRADLEY, J., saying "Such a defence set up in a suit in the state court and overruled there, would clearly entitle the defendants to carry the case by writ of error to the Supreme Court of the United States, both under the 25th section of the old Judiciary Act and under the Act of 1867, passed in lieu thereof. But the only ground on which it could be made thus reviewable by that court, is that it is a case arising under the constitution or laws of the United States, and, if it is such a case, then it is removable to the Circuit Court of the United States under the second section of the Act of 1875." In *Louisiana Lottery* v. *Fitzpatrick*, 3 Woods 222, upon the same question, it was said, "Prior to this statute the jurisdiction of this court depended, in a great measure, upon the condition or character of the parties, and upon particular laws of the United States. This statute vests a jurisdiction of all cases which may involve the enforcement of the constitution, laws and treaties of the United States in their determination." A suit involving the construction of the bankrupt act is a suit involving the construction of the laws and constitution of the United States, and is removable: *Connor* v. *Scott*, 4 Dillon 247. But the fact that the subject of controversy is the title to real estate made under a sale by a United States marshal, is not enough to give jurisdiction to the federal court. Such a case is not one arising under the constitution or laws of the United States: *Gay* v. *Lyons*, 3 Woods 56. In *Van Allen* v. *Atchison, &c., Railroad Co.*, 3 Fed. Rep. 545, the construction of the phrase, cases arising under the constitution and laws of the United States, which had been adopted by the Supreme Court in *Cohens* v. *Virginia*, 6 Wheat. 264, was followed.

But this clause of the act has just received an interpretation from a ma-

jority of the Supreme Court (MILLER, J., dissenting, and CLIFFORD, FIELD and HUNT, JJ., absent), which will tend to settle the law upon this subject so far as it concerns the general principles governing the right of removal under this clause, leaving to future cases the determination of the manner in which this right of removal shall be exercised. The case referred to is *New Orleans Railroad Co.* v. *Mississippi* (U. S. S. C., Oct. Sess., 1880, not yet reported). It was a proceeding instituted on behalf of the state of Mississippi against the railroad company to obtain a mandamus to compel the defendant to remove a bridge with which they had obstructed a navigable river. The defendant filed a petition for removal upon the ground that the case involved a question arising under the constitution and laws of the United States, because an Act of Congress had given them the right to construct this bridge. The case coming before the Supreme Court of the United States upon a writ of error to the highest court of the state, the judgment of the state court, who had refused to recognise the right of removal, was reversed, and Mr. Justice HARLAN, delivering the opinion of the court, said, "A case in law or equity consists of the right of one party as well as of the other, and may properly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection or defence of the party, in whole or in part, by whom they are asserted." The dissenting opinion of Mr. Justice MILLER is worthy of attention; after defining the word "suits," which is the word used in the Act of March 3d 1875, and distinguishing it from "cases," the word used in the constitution, he says, "Taking the idea of a 'suit,' as thus defined, what is meant by the suit arising under a law of Congress? The obvious answer seems to be that the cause of action is founded on the Act of Congress; that the remedy sought is one given by an Act of Congress; that the relief which is prayed is a relief dependent on an Act of Congress; that the right to be enforced in the suit is a right which rests upon an Act of Congress. In all this I see no place for holding that a defence to a suit not so founded on an Act of Congress or a plea which the defendant may interpose to any ordinary action, though that plea be founded on an Act of Congress, is a suit arising under an Act of Congress. Looking also to the reasons which may have influenced Congress, it may well be supposed that while it intended to allow the removal of a suit into the courts of the United States where the very foundation and support of it was a law of the United States, it did not intend to authorize a removal, where the cause of action depended solely on the law of the state, and when the Act of Congress only came in question incidentally as part (it may be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added that a defendant in such case is not without remedy in a federal court, for if he has pleaded and relied on such defence in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here, by the highest court of the United States." The opinion of the majority of the court in this case is also important on another point; they say, "It is not sufficient to exclude the judicial power of the United States from a particular case that it involves questions which do not at all depend on the constitution or laws of the United States, but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original

cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

When an indictment for murder is removed to the federal court for trial under this act, the accused is called upon to answer the offence as defined by the laws of the state where it was committed: *Georgia* v. *O'Grady*, 3 Woods 496. The right of removal in cases arising under this branch of the law is also elaborately discussed by the Supreme Court in *Tennessee* v. *Davis*, 10 Otto 258, and *Strauder* v. *West Virginia*, 10 Id. 303.

In conclusion, we may notice the case of the *People's Bank* v. *Winslow* (U. S. S. C., Oct. Term 1880, not yet reported), where the court reiterated the well-established principle that the consent of the parties cannot give jurisdiction in a case where the requisite citizenship or subject matter does not exist; but in that particular case, which was a suit instituted in a state court, but directly affecting the receiver of a railroad appointed by the federal court, the right of removal was sustained, Mr. Justice MILLER, saying, "The jurisdiction of the United States court does not here depend on the citizenship of the parties, but on the subject-matter of the litigation. That was in the actual possession of that court when the state court attempted to levy its writ of attachment on the property. It was for the court having such possession to determine how far it would permit any other court to interfere with that possession, and what effect it would give to the attempt of another court to seize the property so under its control."

RICHARD C. DALE.

Court of Appeals of New York.

MARY E. HYNES ET AL. *v.* KATE McDERMOTT ET AL.

By the law of New York marriage is a civil contract, and may be created by an agreement *per verba de presenti*, without any required form or ceremony.

Evidence of cohabitation, acknowledgment and reputation, will be sufficient to enable a court to presume an actual marriage in the beginning.

Whether acts sufficient to constitute a marriage by the laws of New York, done in a foreign state, by the laws of which they would not be sufficient, will be held to constitute a valid marriage in New York, not decided.

But in the absence of evidence of the law of the foreign state, the courts of New York will not presume it to be different from the law of New York.

Whether a vessel on the high seas carries with it the marriage law of its nationality, not decided.

An expert in handwriting when testifying only from a comparison of hands, should have before him in court both the writings as to which he speaks and those from which he speaks.

Photographic copies of originals not produced in evidence before the jury are not admissible as foundation for a comparison of hands, especially in the absence of proof of the details of the process by which they were taken, and the accuracy of the work.

Testimony as to handwriting is testimony of opinion. Any person acquainted with it may give his opinion, and the acquaintance need not be from seeing the per-